THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

APPENDIX OF AUTHORITIES

A. *In re Bank of Credit and Commerce International S.A. (No. 2)* [1992] BCLC 579 (Eng.)

B. *In re Bank of Credit and Commerce International S.A. (No. 10)* [1997] Ch. 213 at 224-225 (Eng.)

C. *In re Paramount Airways Ltd.* [1993] Ch. 223 (Eng.)

D. *In re Andrew Weir Insurance Co. Ltd.*, unreported judgment, Nov. 12, 1992 (Eng.)

E. Proceedings of the National Assoc. of Insurance Commissioners, Legislative History, Insurers Rehabilitation and Liquidation Model Act, Jan. 2000 at 555-94 *et. seq.*

EXHIBIT A

Re Bank of Credit and Commerce International SA (No 2)

CHANCERY DIVISION (COMPANIES COURT)
SIR NICOLAS BROWNE-WILKINSON V-C
27 AUGUST 1991

Provisional liquidator – Depositors in bank seeking appointment of an additional provisional liquidator of bank – Bank incorporated in Luxembourg with assets and creditors worldwide – Depositors seeking adjournment of the application – Whether application should be adjourned or dismissed – Role of provisional liquidators.

Partners in Messrs Touche Ross were appointed as provisional liquidators of the Bank of Credit and Commerce International SA (BCCI), a Luxembourg company. Three separate groups of depositors in BCCI sought the appointment of an additional provisional liquidator, from a firm other than Touche Ross. The majority shareholders of BCCI who were discussing a possible rescue operation indicated that they regarded the appointment of an additional provisional liquidator as unhelpful and unlikely to assist the negotiations with the commissaire appointed by the Luxembourg court, who was also a partner in Touche Ross. Accordingly the three groups of depositors applied for an adjournment of their applications, which was opposed by the provisional liquidators and the Bank of England.

Held – An adjournment would be refused and the applications dismissed. The case was not an ordinary one where an adjournment might be contemplated but one of the greatest delicacy, difficulty and complication. Three particular aspects of the case were delicate. First, whether the creditors received anything more than a nominal payment depended on delicate negotiations between the commissaire and the majority shareholders. Second, as BCCI was incorporated in Luxembourg the court in Luxembourg was where the prime winding-up proceedings, if the case proceeded that far, would have to be conducted. The relationship of the High Court in London and the court of Luxembourg was therefore a delicate one. Third, the court should be careful not to suggest that it was concerned to look after the interests of depositors whose claims were against BCCI in England at the expense of other creditors. Any administration under English law would be a worldwide administration of all the assets of BCCI wherever situated for all its creditors wherever they were to be found. In virtually all jurisdictions where court officers had been appointed to preserve the assets of BCCI on an interim basis, the officers were either members of or associated with Touche Ross thereby achieving a co-ordinated system of worldwide administration. To appoint an additional provisional liquidator from a firm other than Touche Ross who was not part of that co-ordinated system would be to send out an entirely erroneous message as to the intentions of the court.

Per curiam. Provisional liquidators do not represent one or another class of

creditors but are independent persons operating under the direction of the court for the purpose of preserving a company's assets for an interim period.

Applications

Three separate groups of depositors in BCCI SA who had applied to the court for the appointment of a provisional liquidator in addition to the liquidators already appointed by the court, sought the leave of the court to adjourn their applications. The facts are set out in the judgments.

Michael Crystal QC, *Richard M Sheldon* and *Robin Dicker* (instructed by *Freshfields*) for Mr Smouha and the liquidators already appointed by the court.

James Wadsworth QC and *David Mabb* (instructed by *Richards Butler*) for the Richards Butler group of creditors.

Peter Harvey (instructed by *Zaiwalla & Co*) for the Zaiwalla group of creditors.

Edward Evans-Lombe QC and *Peter Griffiths* (instructed by *Edwin Coe & Co*) for the Edwin Coe group of creditors.

Mark Phillips (instructed by *Freshfields*) for the Bank of England.

SIR NICOLAS BROWNE-WILKINSON V-C. These are three applications made by three separate groups of depositors in BCCI SA asking for the appointment of a provisional liquidator in addition to those already appointed by the court who are partners in Messrs Touche Ross. Unhappily, the three groups of creditors cannot even agree who the additional provisional liquidator should be. Those represented by Messrs Richards Butler put forward a member of Messrs Cork Gully, those represented by Messrs Zaiwalla & Co a partner in Messrs Halpern & Woolf and those represented by Messrs Edwin Coe & Co a partner in Messrs Grant Thornton. The Richards Butler creditors total directly and indirectly some $658m, the Zaiwalla creditors some $32m and the Edwin Coe creditors some $135m.

The application for the appointment of an additional provisional liquidator is with a view to establishing, jointly with the existing provisional liquidators, a representative of the creditors the exact ambit of whose functions has not as yet been outlined. Those three applications were due to come before me today. But on 24 August Messrs Simmons & Simmons (representing the majority shareholders in BCCI, the government of Abu Dhabi and its ruler) wrote indicating that they regarded the suggestion of there being an additional liquidator as unhelpful and not calculated to assist in the very delicate negotiations which are currently proceeding between Mr Smouha, the commissaire appointed by the Luxembourg court and also a partner in Touche Ross, and the majority shareholders, with a view to seeing whether any form of rescue operation in whole or in part can be evolved. In the light of that letter all three of the applicants have indicated that they do not wish at this stage to do anything that would conflict with the views of the majority shareholders and therefore do not wish to move their applications for the appointment of additional liquidators. Instead they ask that I should adjourn the matter so that, if the circumstances hereafter change, they could bring back their applications at that stage.

The application for an adjournment is opposed by the provisional liquidators themselves and by the Bank of England. All that I have to do at this stage is to decide whether or not there should be an adjournment. In anything like an

ordinary case, it might well be an open question whether there should or should not be an adjournment of an application of this kind. But the one thing that I should have thought was now clear to everybody was that this is in no way anything like an ordinary case. It is a case of the greatest delicacy, difficulty and complication. So far as the present application is concerned, there are three particular aspects of it that are delicate.

The first are the negotiations between Mr Smouha and the majority shareholders, negotiations upon which will depend to a great extent whether any creditors anywhere get more than a nominal payment. It is quite clear that those negotiations are very delicate. Mr Smouha and the other party of majority shareholders wish it to be in no doubt that he is not in a position to conclude a bargain: he is negotiating with a view to proposing a possible solution if one can be found.

The second delicate aspect is the relationship between this court and the court of Luxembourg. BCCI is incorporated in Luxembourg which prima facie is the court where the prime winding-up proceedings, if it ever gets that far, will have to be conducted as being the law of the country of incorporation. Some suggestions have been made that in some way it is inappropriate that that should be the primary administration were a winding-up order to be made. That is not a view with which I can concur in any way. There is nothing to indicate that the court of Luxembourg would be in some way regarded as inappropriate, if otherwise under the general law that is the right court to administer the matter.

Thirdly, there are proceedings in the United States brought by the provisional liquidators in this country, by the commissaire in Luxembourg and the court-appointed officers in the Cayman Islands designed to freeze the assets in the United States. Interim relief has been granted providing to a substantial extent the freezing order required, but there are further inter partes proceedings pending. If it is suggested in those proceedings (as I am told that it is suggested) that this court is in some way concerned to look after the interests of the English depositors or those whose claim is against BCCI in England at the expense of creditors elsewhere, the message that would go out would be extremely dangerous and totally erroneous: I have asked all counsel before me today, including those representing the three batches of creditors, whether they were maintaining that there could be any sort of ring fence rendering assets in any one jurisdiction applicable for the benefit of the creditors in that jurisdiction only. They have all disowned that proposition. There is therefore unanimity amongst the bar, unanimity with which I totally concur, that any administration in any jurisdiction under English law would be a worldwide administration for the administration of all assets wherever to be found for the benefit of all creditors wherever to be found. That is reflected by the fact that hitherto in virtually all jurisdictions where court proceedings have been taken the court officers appointed to preserve on an interim basis the assets of the BCCI group have either been members of Touche Ross or associates of Touche Ross. Thereby the accountancy profession has managed to achieve, at least in part, a worldwide system for regulating international insolvency which the civilised countries of the world have failed to achieve so far as the law is concerned. For this court to contemplate on the existing state of affairs that there could be imported into that machinery somebody who was not part of the otherwise co-ordinated system of administration would be to send out an entirely erroneous message about what were the intentions and likely intentions of this court.

I do not believe that it can be right for this matter to be adjourned and stood over. Either it must be moved today or it must be dismissed so that it is clear that this application is not going forward. I must therefore ask each of the creditors whether they intend to move this motion further an adjournment having been refused.

Counsel for the creditors declined to move.

SIR NICOLAS BROWNE-WILKINSON V-C. Thank you. Can I then add a few words, because there is a matter that does give me concern? That is the widespread statement that there is unease amongst the creditors as to the fact that they do not have what is sometimes called a representative amongst the number of the provisional liquidators. In the hope that what I say may carry some weight if put to the unbelieving creditors, can I shortly state the role of the provisional liquidators?

They are accountants appointed by the court to get in and to safeguard assets of BCCI. They may not take any major step without obtaining directions from the court as to the steps that are appropriate to be taken. They are not responsible for any distribution of assets. All they are doing is holding assets. If there is an application to be made to the court which might substantially affect one or more of the creditors, it is the function of the provisional liquidators' lawyers to notify creditors who may be affected to give them an opportunity to be heard before the court.

The provisional liquidators are not a body that has representatives of one class of creditor or another class of creditor. The provisional liquidators are independent persons operating under the direction of the court for a purpose that is one entirely of preservation during an interim period.

For myself I cannot see what ground for mistrust there is. I hope that legal advisers will do their best to press the nature of the provisional liquidators' role on the creditors. I will certainly explore with Mr Crystal QC now the possibility that I would welcome, if it is feasible, of a committee of inspection of an informal nature to which information can be communicated by the provisional liquidators and through which requests for information or action can be channelled to the provisional liquidators. I believe that an informal committee of that kind, representing creditors worldwide if they wish to be represented on it, is much more likely to provide what the creditors need than to complicate the task, and to increase enormously the expense, of the provisional liquidation by the introduction of yet another firm of accountants into the matter.

Order accordingly.

Evelyn M C Budd Barrister.

EXHIBIT B

Ch.

In re BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A. (No. 10)

[Ch. No. 007615 of 1991]

1996 July 16, 17, 18, 22, 23, 24, 25; Aug. 6

Sir Richard Scott V.-C.

Insolvency—Winding up—Set-off—Principal liquidation in foreign country of incorporation—Ancillary liquidation in England—Mutual set-off allowed by English law but not by foreign law—Whether English liquidators to retain funds to satisfy set-off in English liquidation—Whether jurisdiction to disapply set-off rule—Insolvency Rules 1986 (S.I. 1986 No. 1925), r. 4.90

The bank, which transacted a large part of its business in the United Kingdom and which formed part of an international group carrying on banking business through branches in 75 countries, went into liquidation in Luxembourg, the country of its incorporation. Ten days later an order was made in England that the bank be wound up by the English court under the Insolvency Act 1986. It was subsequently agreed between the bank's liquidators in Luxembourg, in England and in various other jurisdictions that 48·5 per cent. of the global realisations of the bank's assets should be distributed by the English liquidators, who had at their disposal substantial proceeds of realisations of English assets. The liquidators also agreed that the liquidation worldwide should be a joint enterprise with all creditors wherever situate receiving the same level of dividend from a central pool. The English liquidators wished to release the funds at their disposal to the Luxembourg liquidators for a distribution among creditors worldwide pari passu, with the money, once transferred to Luxembourg, being distributed according to the principles of Luxembourg insolvency law. Luxembourg insolvency law disallowed set-off for a debtor who was simultaneously owed money by the insolvent, whereas rule 4.90 of the Insolvency Rules 1986[1] provided for mutual credit and set-off, permitting a creditor/debtor or creditor who was also a debtor to set off his debt from the sum owed to him and prove any balance.

On the application of the English liquidators for directions whether, before releasing the funds to the Luxembourg liquidators, they should retain sufficient funds to satisfy debtors and creditors entitled to take advantage of any set-off available to them under rule 4.90:—

Held, that where a foreign company was in liquidation in its country of incorporation, any winding up in England would be ancillary thereto; that the functions of the ancillary liquidators were to realise the English assets, to settle a list of English creditors and to transmit the assets and the list to the principal liquidators to enable a dividend to be declared and paid; but that the ancillary nature of such an English winding up did not relieve the English court of the obligation to apply English insolvency

[1] Insolvency Rules 1986, r. 4.90: "(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor . . . (2) An account shall be taken . . . and the sums due from one party shall be set off against the sums due from the other. . . . (4) Only the balance . . . of the account is provable in the liquidation. . . ."

law to the resolution of any issue arising in the winding up in the English court; that there was no power to disapply rule 4.90 of the Insolvency Rules 1986 regarding set-off or any other substantive rule forming part of the statutory scheme under the Insolvency Act 1986 or those Rules; that, in the circumstances, it would not be appropriate to disapply rule 4.90 even if there were jurisdiction to do so; and that, accordingly, the English liquidators would be directed to retain sufficient funds to make provision for the dividend that net creditors entitled to take advantage of the English insolvency rules of set-off would receive in the English liquidation, but that no provision need be made for net debtors (post, pp. 239E–F, 246B–E, 247A–B, D–G, 249C–G, 250A–B, 251D–E).

The following cases are referred to in the judgment:

Alfred Shaw & Co. Ltd., In re; Ex parte Mackenzie (1897) 8 Q.L.J. 93
Commercial Bank of South Australia, In re (1886) 33 Ch.D. 174
English, Scottish, and Australian Chartered Bank, In re [1893] 3 Ch. 385
Federal Bank of Australia Ltd., In re (1893) 62 L.J.Ch. 561; 68 L.T. 728, C.A.
Felixstowe Dock & Railway Co. v. United States Lines Inc. [1989] Q.B. 360; [1989] 2 W.L.R. 109; [1988] 2 All E.R. 77
Fitzgerald v. Williams [1996] Q.B. 657; [1996] 2 W.L.R. 447; [1996] 2 All E.R. 171, C.A.
Hibernian Merchants Ltd., In re [1958] Ch. 76; [1957] 3 W.L.R. 486; [1957] 3 All E.R. 97
North Australian Territory Co. Ltd. v. Goldsbrough Mort and Co. Ltd. (1889) 61 L.T. 716
Queensland Mercantile Agency Co. Ltd., In re (1888) 58 L.T. 878
Sedgwick Collins and Co. v. Rossia Insurance Co. of Petrograd [1926] 1 K.B. 1, C.A.
Stein v. Blake [1996] A.C. 243; [1995] 2 W.L.R. 710; [1995] 2 All E.R. 961, H.L.(E.)
Suidair International Airways Ltd., In re [1951] Ch. 165; [1950] 2 All E.R. 920
Vocalion (Foreign) Ltd., In re [1932] 2 Ch. 196

The following additional cases were cited in argument:

Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470, H.L.(E.)
Aectra Refining and Manufacturing Inc. v. Exmar N.V. [1994] 1 W.L.R. 1634, C.A.
African Farms Ltd., In re (1906) T.S. 373
Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re [1891] 1 Ch. 213, C.A.
Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884, H.L.(E.)
Aratra Potato Co. Ltd. v. Egyptian Navigation Co. [1981] 2 Lloyd's Rep. 119, C.A.
Australian Federal Life and General Assurance Co. Ltd., In re [1931] V.R. 317
Azoff-Don Commercial Bank, In re [1954] Ch. 315; [1954] 2 W.L.R. 654; [1954] 1 All E.R. 947
Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A. (Note) [1993] 1 W.L.R. 509; [1992] 4 All E.R. 161
Banco de Portugal v. Waddell (1880) 5 App.Cas. 161, H.L.(E.)
Bank of Credit and Commerce International S.A. (No. 2), In re [1992] B.C.L.C. 579

Bank of Credit and Commerce International S.A. (No. 3), In re [1993] B.C.L.C. 106; [1993] B.C.L.C. 1490, C.A.

Bank of Credit and Commerce International S.A. (No. 8), In re [1996] Ch. 245; [1996] 2 W.L.R. 631; [1996] 2 All E.R. 121, C.A.

Bankers Trust International Ltd. v. Todd Shipyards Corporation [1981] A.C. 221; [1980] 3 W.L.R. 400; [1980] 3 All E.R. 197, P.C.

Banque des Marchands de Moscou (Koupetschesky) v. Kindersley, In re [1951] Ch. 112; [1952] 1 All E.R. 1269, C.A.

Banque Indosuez S.A. v. Ferromet Resources Inc. [1993] B.C.L.C. 112

Blain, Ex parte; In re Sawers (1879) 12 Ch.D. 522, C.A.

Clark v. Oceanic Contractors Inc. [1983] 2 A.C. 130; [1983] 2 W.L.R. 94; [1983] 1 All E.R. 133, H.L.(E.)

Commercial Bank of India, In re (1868) L.R. 6 Eq. 517

Compania Merabello San Nicholas S.A., In re [1973] Ch. 75; [1972] 3 W.L.R. 471; [1972] 3 All E.R. 448

Continental Bank N.A. v. Aeakos Compania Naviera S.A. [1994] 1 W.L.R. 588; [1994] 2 All E.R. 540, C.A.

Gibbs (Antony) & Sons v. La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399, C.A.

Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd. [1972] A.C. 785; [1972] 2 W.L.R. 455; [1972] 1 All E.R. 641, H.L.(E.)

Halifax Building Society v. Registry of Friendly Societies [1978] 1 W.L.R. 1544; [1978] 3 All E.R. 403

Hanak v. Green [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A.

Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd. [1993] Q.B. 701; [1993] 3 W.L.R. 42; [1993] 3 All E.R. 897, C.A.

I.I.T., In re (1975) 58 D.L.R. (3d) 55

International Tin Council, In re [1987] Ch. 419; [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890

Jabbour (F. & K.) v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145

Jarvis Conklin Mortgage Co., In re (1895) 11 T.L.R. 373

Joachimson (N.) v. Swiss Bank Corporation [1921] 3 K.B. 110, C.A.

Klæbe, In re; Kannreuther v. Geiselbrecht (1884) 28 Ch.D. 175

Kwok v. Commissioner of Estate Duty [1988] 1 W.L.R. 1035, P.C.

Levasseur v. Mason and Barry Ltd. (1890) 63 L.T. 700

Libyan Arab Foreign Bank v. Bankers Trust Co. [1989] Q.B. 728; [1989] 3 W.L.R. 314; [1989] 3 All E.R. 252

M.S. Fashions Ltd. v. Bank of Credit and Commerce International S.A. [1993] Ch. 425; [1993] 3 W.L.R. 220; [1993] 3 All E.R. 969, Hoffmann L.J. and C.A.

Macfadyen (P.) & Co., In re; Ex parte Vizianagaram Co. Ltd. [1908] 1 K.B. 675

Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation [1986] Ch. 482; [1986] 2 W.L.R. 453; [1986] 1 All E.R. 653

Matheson Bros. Ltd., In re (1884) 27 Ch.D. 225

Melbourn, Ex parte; In re Melbourn (1870) L.R. 6 Ch.App. 64

Mersey Steel and Iron Co. v. Naylor, Benzon & Co. (1882) 9 Q.B.D. 648, C.A.

N.F.U. Development Trust Ltd., In re [1972] 1 W.L.R. 1548; [1973] 1 All E.R. 135

National Bank of Greece & Athens S.A. v. Metliss [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, H.L.(E.)

National Benefit Assurance Co., In re [1927] 3 D.L.R. 289

New York Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101, C.A.

New Zealand Loan and Mercantile Agency Co. Ltd. v. Morrison [1898] A.C. 349, P.C.
Oriental Inland Steam Co., In re; Ex parte Scinde Railway Co. (1874) L.R. 9 Ch.App. 557
Paramount Airways Ltd., In re [1993] Ch. 223; [1992] 3 W.L.R. 690; [1992] 3 All E.R. 1, C.A.
Real Estate Development Co., In re [1991] B.C.L.C. 210
Rolls Razor Ltd. v. Cox [1967] 1 Q.B. 552; [1967] 2 W.L.R. 241; [1967] 1 All E.R. 397, C.A.
Rossano v. Manufacturers' Life Assurance Co. [1963] 2 Q.B. 352; [1962] 3 W.L.R. 157; [1962] 2 All E.R. 214
Russian Bank for Foreign Trade, In re [1933] Ch. 745
Sefel Geophysical Ltd., In re (1988) 54 D.L.R. (4th) 117
Smith v. Buchanan (1800) 1 East 6
Sovereign Life Assurance Co. v. Dodd [1892] 2 Q.B. 573, C.A.
Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)
Standard Insurance Co. Ltd., In re [1968] Qd.R. 118
Union Theatres Ltd., In re (1933) 35 W.A.L.R. 89

APPLICATION

The English liquidators of the Bank of Credit and Commerce International S.A. ("B.C.C.I.") applied for directions, inter alia, that prior to (a) the English liquidators transmitting to the Luxembourg liquidators the proceeds of the realisations of B.C.C.I. property (as defined in the pooling agreement) now or hereafter held by the English liquidators and/or (b) the English liquidators authorising funds available to them and now or hereafter held by or under the control of the Luxembourg liquidators and the Cayman liquidators to be distributed by way of dividend, the English liquidators be authorised and directed (1) to make a provision of U.S.$427m. in respect of the potential rights of set-off available under English law to persons having material dealings with the English branches of B.C.C.I. outstanding at 3 January 1992; (2) out of the provision referred to in paragraph (1) to pay first and subsequent dividends to persons having a deposit with, or material claim arising out of a transaction with, the English branches of B.C.C.I. who would (applying English insolvency rules of set-off) be creditors of B.C.C.I. as at 3 January 1992, at the same time and at the same rate as the Luxembourg liquidators pay first and subsequent dividends to creditors of B.C.C.I.; and (3) to retain the remainder of the provision referred to in paragraph (1) and deal with the same in accordance with the further directions of the court.

The facts are stated in the judgment.

Michael Crystal Q.C., Martin Pascoe and *Fidelis Oditah* for the English liquidators of B.C.C.I. The making of a winding up order by the English court, under the Insolvency Act 1986 and the Insolvency Rules 1986, as amended, brings into operation a statutory scheme for dealing with the assets of the company subject to the order: see *In re International Tin Council* [1987] Ch. 419, 445F–447B. As to the winding up of foreign companies as unregistered companies, see sections 221, 229 of the Act 1986 and *In re International Tin Council* [1987] Ch. 419, 446D.

A The English court, so far as it can properly do so, will assist the foreign court having the conduct of the principal liquidation of a company so as to ensure that all creditors, irrespective of nationality or location, are able to share in the proceeds of realisation of the insolvent company's assets worldwide. However, where the English court conducts an ancillary liquidation it must do so according to English law: see *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394; *In re Suidair* B *International Airways Ltd.* [1951] Ch. 165, 173–174; *Felixstowe Dock & Railway Co. v. United States Lines Inc.* [1989] Q.B. 360, 389C; Lord Hoffmann, "Cross Border Insolvency" (the 1996 Denning Lecture, 18 April 1996) and *In re Alfred Shaw & Co. Ltd., Ex parte Mackenzie* (1897) 8 Q.L.J. 93. [Reference was also made to *In re Commercial Bank of South Australia* (1886) 33 Ch.D. 174, 178; *North Australian Territory Co.* C *Ltd. v. Goldsbrough Mort and Co. Ltd.* (1889) 61 L.T. 716, 717; *In re Federal Bank of Australia Ltd.* (1893) 62 L.J.Ch. 561, 563 and *Sedgwick Collins and Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 13.] In those cases where the English court limits the functions of its liquidator to collection of the English assets, the English court is recognising the practical limitations of the English winding up order abroad, namely, that other countries, in accordance with their own rules of private international D law, may not recognise the English winding up order or the title of the English liquidator: see *In re International Tin Council* [1987] Ch. 419, 446G–447B. Comity, that courteous and friendly reciprocal understanding and forbearance by which each nation respects the law, institutions and usages of another, does not require the English court to depart from the terms of the statutory scheme: see *In re Sefel Geophysical Ltd.* (1988) E 54 D.L.R. (4th) 117, 124, 126.

In an ancillary winding up in England, the English court will recognise and give effect to rights acquired under the English statutory scheme at the date of the winding up order. The court may allow realisations to be transmitted to the principal liquidator if the principal liquidator is in a position to provide satisfactory undertakings, or security, sanctioned by the court of the principal liquidation, to distribute the realisations in F accordance with the local statutory scheme: see *In re Standard Insurance Co. Ltd.* [1968] Qd.R. 118 and *In re Australian Federal Life and General Assurance Co. Ltd.* [1931] V.R. 317. Where the English court of the ancillary liquidation directs the ancillary liquidator to transmit the net proceeds of realisation of local assets to the principal liquidator, it does so subject to the payment of claims which, by its own law, are entitled to G priority: see *In re National Benefit Assurance Co.* [1927] 3 D.L.R. 298, 301–302; *In re Union Theatres Ltd.* (1933) 35 W.A.L.R. 89 and *In re Standard Insurance Co. Ltd.* [1968] Qd.R. 118. The court will also make provision for non-preferential fiscal claims where these would not be recognised in the liquidation abroad.

English insolvency set-off is automatic and self-executing, taking effect without the need for submission of any proof of debt: see *Stein v. Blake* H [1996] A.C. 243, 251D–E, 252B–C, 253F, 258D. It is also mandatory. Thus, it is not possible to contract out of rule 4.90 of the Insolvency Rules 1986: *Rolls Razor Ltd. v. Cox* [1967] 1 Q.B. 552, 570B; *Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd.* [1972] A.C. 785 and

Stein v. Blake [1996] 1 A.C. 243, 254E–F. [Reference was also made to the Contracts (Applicable Law) Act 1990 and articles 2(e), 3, 7(2), 10(1)(d), 16 of the Rome Convention.]

Nigel Davis Q.C. for the Arab Banking Corporation ("A.B.C."), a net creditor of B.C.C.I. The starting point is that the winding up of a company under the Insolvency Act 1996 is governed by English law: *Dicey & Morris, The Conflict of Laws* (12th ed.) (1993), pp. 1131–1133. Under English law any creditor may prove in an English liquidation, whether or not the company in liquidation is foreign, whether or not the creditor is foreign, whether or not the law of the claim is foreign: see *Dicey and Morris, The Conflict of Laws,* p. 1169; *Ex parte Melbourn; In re Melbourn* (1870) 6 Ch. App. 64, 69–70; *In re Klœbe* (1884) 28 Ch.D. 175, 180; *In re Azoff-Don Commercial Bank* [1954] 1 Ch. 315, 333 and rule 4.90 of the Rules of 1986.

On its true construction rule 4.90 (the insolvency set-off rule) is mandatory and automatic and binds both liquidators and creditors: see *Stein v. Blake* [1996] A.C. 243; *In re M.S. Fashions* [1993] Ch. 425 and *In re B.C.C.I. (No. 8)* [1996] 2 W.L.R. 631, 637C. Thus a proving creditor (or liquidator) may only claim the balance of what is due. This is so even though A.B.C.'s credits arose abroad (under dealings with foreign branches of B.C.C.I.) and its debt was incurred in favour of the London branch of B.C.C.I.; the insolvency set-off rule applies in all cases. In any event, A.B.C.'s relationship with B.C.C.I. is sufficiently closely connected with England for it to be just and proper for A.B.C. to have the benefit of the more generous rules of English set-off: see *In re Paramount Airways Ltd.* [1993] Ch. 223, 239H–240A, 242C–D.

The fact that under Luxembourg law there is no provision corresponding to rule 4.90 cannot operate to displace the application of the insolvency set-off rule in the English liquidation: see *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394 and *In re Suidair International Airways Ltd.* [1951] Ch. 165, 173–174. That the law of a foreign principal liquidation can not govern or determine the mode of administration of an English ancillary liquidation is further illustrated by the position on questions of priorities. The general rule is that the English liquidator applies English law as to priorities: see *Ex parte Melbourn; Bankers Trust International Ltd. v. Todd Shipyards Corporation* [1981] A.C. 221, 230A–235G and *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196, 207. Thus the English liquidator ordinarily discharges local preferential claims before remitting assets to the principal liquidator. This approach to priorities applies equally to set-off.

Accordingly the court has no power in effect to disapply the operation of rule 4.90 by permitting remittance of the collections of the English liquidators to the Luxembourg liquidators without provision for set-off. Alternatively, even if the Court does have power so to order, then in its discretion it should not do so in this case. Such a course would otherwise be unfairly prejudicial to creditors proving in England. [Reference was made to *Felixstowe Dock & Railway Co. Inc. v. United States Line Inc.* [1989] Q.B. 360.]

Hilary Heilbron Q.C., for Mr. Ismail of the Rising Group, a net debtor, adopted the argument of A.B.C.

A *John Jarvis Q.C.* and Sandry Shandro, solicitor, for the Deposit Protection Board. The board's statutory right under section 62(3) of the Banking Act 1987 to recoup compensation payments will be overriden by the Luxembourg liquidators if no provision is made by the English liquidators. The board should not be treated like an ordinary creditor. It is given statutory rights which the English liquidators, as officers of the court, are bound to honour. The court should ensure that the scheme, B enacted as a matter of English public policy to provide protection for depositors, is enforced.

The court of the ancillary winding up will not permit funds to be transmitted to the jurisdiction of the court of the principal winding up without first making provision for the local secured, preferential and statutory creditors: see *In re National Benefit Assurance Co.* [1927] C 3 D.L.R. 289, 302; *In re Queensland Mercantile Agency Co. Ltd.* (1888) 58 L.T. 878, 879; *In re African Farms Ltd.* (1906) T.S. 373, 377, 381, 382, 384, 392 and *In re Union Theatres Ltd.*, 35 W.A.L.R. 89, 91.

In cases of concurrent ancillary and principal liquidations it is usually the case that claims are admitted according to the procedures applicable in each jurisdiction: see *In re Macfadyen & Co.* [1908] 1 K.B. 675, 676; *In re Standard Insurance Co. Ltd.* [1968] Qd.R. 118, 120–121 and *In re* D *Commercial Bank of South Australia,* 33 Ch.D. 174, 178.

Ajmalul Hossain for the B.C.C.I. campaign committee representing the interests of all ex-employees of B.C.C.I. worldwide. The employees have a right of set-off under their contracts of employment, so that they can set off outstanding loans made by B.C.C.I. for the purchase of their homes as perquisites of their employment against arrears of salary, notice pay, E relocation expenses, termination benefits etc. Alternatively, they have an equitable right of set-off which will result in a net debtor or creditor position being achieved before the date of liquidation: see *Hanack v. Green* [1958] 2 Q.B. 9 and *Aectra Refining and Manufacturing Inc. v. Exmar N.V.* [1994] 1 W.L.R. 1634, 1650A. Thus by application of the English law of contractual set-off or equitable set-off the employees end up in a net debtor or net creditor position long before the date of the liquidation.

F In any event, the English liquidators' argument on the issue of insolvency set-off is correct.

Anthony Trace and *Michael Gibbon*, for the joint liquidators of B.C.C. Gibraltar Ltd., adopted the arguments of the English liquidators on set-off.

Robin Dicker for C.M. Fashions (Leeds) Ltd., a representative net G creditor, adopted the arguments of the English liquidators.

Simon Mortimore Q.C. for the Bank of China (a net creditor), adopting the argument of the English liquidators. Under English law the statutory scheme may only be departed from where (1) there is a "compromise or arrangement between a company and its creditors" within section 425 of the Companies Act 1985; (2) there is a voluntary arrangement under Part I of the Insolvency Act 1986; and (3) there is a "compromise or H arrangement with creditors or persons claiming to be creditors" sanctioned by the court in accordance with section 167(1) of and paragraph 2 of Part 1 of Schedule 4 to the Act of 1986. [Reference was made to *In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* (1891)

1 Ch. 213, 239, 243, 244, 245, 247; *Sovereign Life Assurance Co. v. Dodd* (1892) 2 Q.B. 573, 580, 583; *In re N.F.U. Development Trust Ltd.* [1972] 1 W.L.R. 1548 and *Halifax Building Society v. Registry of Friendly Societies* [1978] 1 W.L.R. 1544.]

The indebtedness of Bank of China to B.C.C.I. arising out of the deposit surplus is closely connected with the English jurisdiction. English law governs the deposit surplus debt since the normal rules are that (a) a deposit is payable at the place where it is made and (b) loans made by a bank are subject to the law of the place where they are to be repaid. [Reference was made to *N. Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110, 121, 127, 129, 130; *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101, 111, 112, 115, 116, 120, 121; *Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146; *Rossano v. Manufacturers Life Insurance* [1963] 2 Q.B. 352, 378–379; *Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch. 482, 494; *Kwok v. Commissioner of Estate Duty* [1988] 1 W.L.R. 1035, 1041, 1042 and *Libyan Arab Foreign Bank v. Bankers Trust Co.* [1989] Q.B. 728, 746, 747.] Since 1 April 1991 the position in England is governed by the Contracts (Applicable Law) Act 1990 and the Rome Convention: see articles 1, 3, 4, 10 of the Convention.

Where rule 4.90 applies it does so automatically. It is self-executing. To the extent that it applies it extinguishes the debt: see *Stein v. Blake* [1996] A.C. 243. If the debt is not subject to English law and is not sued for in England it will not be discharged by virtue of the winding up of B.C.C.I. S.A. in England and the application of rule 4.90. [Reference was made to *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399; *New Zealand Loan and Mercantile Agency Co. Ltd. v. Morrison* [1898] A.C. 349, 359 and *In re Russian Bank for Foreign Trade* [1933] Ch. 745, 767.]

Susan Prevezer for B.C.C.I. S.A. Isle of Man and B.C.C.I. S.A. Scotland. Creditors who dealt with Scottish or Isle of Man branches should have provision made for them out of English assets even though they had no dealings with English branches as the insolvency regimes there have similar set-off rules to rule 4.90.

Ian Geering Q.C. and *Richard Snowden* for the Luxembourg liquidators of B.C.C.I. An English winding up order is of worldwide effect and does not adopt a policy of "ring fencing" branches of an international company by local liquidators: see *In re Bank of Credit and Commerce International S.A. (No. 2)* [1992] B.C.L.C. 579 and *In re B.C.C.I. S.A. (No. 3)* [1993] B.C.L.C. 1490.

The English court, in common with the courts in many other common law jurisdictions, will generally recognise a liquidator of a foreign company appointed by the court of the place of incorporation. Such a liquidator will be recognised as having the authority to administer the assets of the company worldwide: see *In re I.I.T.* (1975) 58 D.L.R. (3d) 55 and *Baden v. Société Générale pour Favoriser le Développement du Commerce et de L'Industrie en France S.A. (Note)* [1993] 1 W.L.R. 509. In order to avoid a conflict of liquidations and laws in the case of concurrent insolvencies and to promote equal treatment of unsecured creditors worldwide, the winding up in England will usually be treated as ancillary to the winding

A up in the place of incorporation: see *In re Matheson Bros. Ltd.* (1884) 27 Ch.D. 225; *In re Commercial Bank of South Australia,* 33 Ch.D. 174, 178; *In re Federal Bank of Australia Ltd.*, 62 L.J. Ch. 561; *In re National Benefit Assurance Co.* [1927] 3 D.L.R. 289 and *In re Vocalian (Foreign) Ltd.* [1932] Ch. 192, 206–207. [Reference was also made to *Sedgwick Collins & Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 16; *In re Matheson Bros. Ltd.* (1884) 27 Ch.D. 225; *In re Commercial Bank of South*
B *Australia,* 33 Ch.D. 174 and *Banque Indosuez S.A. v. Ferromet Resources Inc.* [1993] B.C.L.C. 112.] Orders in ancillary liquidations necessarily involve a significant departure from the statutory scheme of administration of the estate of an insolvent company under the Insolvency Act 1986. Directing that assets, once realised, be remitted to a foreign liquidator for distribution by him, instead of being distributed to creditors by the English
C liquidator, is itself a departure from section 143(1) of the Act of 1986 and rules 4.179 and 4.180 of the Rules of 1986.

The English court has power to make any order which it thinks fit on the hearing of a winding up petition: section 125(1) of the Act of 1986. It also has, since 1986, power to review, rescind or vary any order made by it in the exercise of its winding up jurisdiction: see rule 7.47(1). In any event the court always has an inherent power to control its own procedures
D and officers.

The court's approach to ancillary liquidations is consistent with the established principles of statutory construction. There is a presumption of construction of an English statute that unless the contrary is expressly enacted or plainly implied, it is applicable only to English subjects or to those who have submitted to the jurisdiction: see *In re Paramount Airways*
E *Ltd.* [1993] Ch. 223, 232B–233C; *Ex parte Blain* (1879) 12 Ch.D. 522, 526 and *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130, 145, 152.

Creditors of B.C.C.I. do not have any set-off rights under rule 4.90 which must be protected as a matter of discretion. Rule 4.90 is merely part of a code of procedure whereby insolvent estates are administered in a proper and orderly way: see *Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd.* [1972] A.C. 785.

F In 1992 the English liquidators decided and the English courts determined that the insolvent estate of B.C.C.I. S.A. was to be administered in Luxembourg in accordance with Luxembourg law and there were to be no processes of proof and distribution of assets in England: see clause 3.1 and 3.11 of the pooling agreement. The pooling agreement was a compromise binding on all creditors by which they gave
G up rights to prove debts with the benefit of rule 4.90. In return creditors obtained the benefits the agreement offered such as worldwide co-operation between liquidators and were given the possibility that provisions would be made in the exercise of the court's discretion. Accordingly, from the execution of the pooling agreement in 1994, those parts of the English procedural code set out in the Insolvency Rules as to proof of debts and distributions in a domestic English liquidation, including rule 4.90, were
H disapplied and had no further effect: see *In re B.C.C.I. S.A. (No. 2)* [1992] B.C.L.C. 715, 719–720 and [1992] B.C.L.C. 715, 733–744F. The English court has a discretionary power to disapply in an ancillary English liquidation all or any parts of the statutory insolvency scheme. On the

issue of discretion, no provisions ought to be made as fairness demands that all creditors worldwide be dealt with equally under one legal system, i.e. Luxembourg law.

John Brisby Q.C. for Mr. Peter Ackermann, a creditor with no loan to set off. The court has an inherent power to disapply rule 4.90 or any other provisions of the statutory insolvency scheme. Alternatively, the court may make such order as it thinks fit under section 125(1) of the Act of 1986 and this could include disapplying rule 4.90 in an ancillary liquidation.

Whatever the effect of *Stein v. Blake* [1996] A.C. 243, the Insolvency Rules as a whole are procedural. It is only in this overall procedural context that rule 4.90 creates substantive rights. The court has power to disapply procedural rules either in whole or in part in order to avoid the administration of the ancillary English liquidation coming into conflict with the rules of the principal liquidation. It would not even be possible for the court to permit the English liquidators (or any of the liquidators in ancillary liquidations in the reported cases over the past 100 years) to transfer the funds at their disposal to the Luxembourg liquidators if this were not so. If the court has power to order transmission of funds to enable a pari passu distribution to worldwide creditors to be achieved it has power to disapply rule 4.90 and should do so.

Barbara Dohmann Q.C. and *Tom Beazley* for the English liquidation committee. There is nothing exceptional or extraordinary in the English court exercising its jurisdiction in a restricted or limited way in support of foreign proceedings, or staying its proceedings so that a matter can be determined by a more appropriate court. There is indeed a presumption against multiplication of related litigation in different jurisdictions. [Reference was made to *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, articles 21, 23, 24; *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General Insurance Co. Ltd.* [1993] Q.B. 701, 724E, 726B; *Continental Bank N.A. v. Aeakos S.A.* [1994] 1 W.L.R. 588, 593; *In re Commercial Bank of India* (1868) L.R. 6 Eq. 517; *In re Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1951] Ch. 112, 126; see *In re Real Estate Development* [1991] B.C.L.C. 210; *In re Compania Merabello San Nicholas S.A.* [1973] Ch. 75; *In re Matheson Bros. Ltd.*, 27 Ch.D. 225, 230; *In re Commercial Bank of South Australia*, 33 Ch.D. 174, 178; *In re Queensland Mercantile Agency Co. Ltd.*, 58 L.T. 878; *In re Jarvis Conklin Mortgage Co.* (1895) 11 T.L.R. 373; *Levasseur v. Mason and Barry Ltd.* (1890) 63 L.T. 700; *In re Federal Bank of Australia Ltd.*, 62 L.J.Ch. 561; *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394; *Sedgwick Collins & Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 13; *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch.D. 196, 207; *In re Hibernian Merchants Ltd.* [1958] 1 Ch. 76 and *In re Suidair International Airways Ltd.* [1951] 1 Ch. 165.]

The English liquidation is not a full winding up taking place in accordance with the Insolvency Act 1986 but is subject to the liquidation in Luxembourg under Luxembourg law as agreed by the liquidators in 1992 and endorsed by the courts here and elsewhere. The fact that foreign

law or procedure is different from English law or procedure does not render it inferior or unjust. Indeed it is only in exceptional cases that such comparisons are permissible at all. [Reference was made to *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] A.C. 50; *Aratra Potato Co. Ltd. v. Egyptian Navigation Co.* [1981] 2 Lloyd's Rep. 119 and *The Abidin Daver* [1984] A.C. 398.]

The fact that in *Stein v. Blake* [1996] A.C. 243 and *In re B.C.C.I. S.A. (No. 8)* [1996] Ch. 245, rule 4.90 was described as mandatory and automatic does not establish that the rule is of such importance that it has to be applied by the English court in an ancillary winding up. The English courts have not, however, recognised the authority of the foreign court of the place of incorporation to discharge the contractual obligations of the company where the contract was governed by English law. [Reference was made to *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux,* 25 Q.B.D. 399; *Smith v. Buchanan* (1800) 1 East 6; *National Bank of Greece & Athens S.A. v. Metliss* [1958] A.C. 509; *Banco de Portugal v. Waddell* (1880) 5 App.Cas. 161; *In re Oriental Inland Steam Co.* (1874) L.R. 9 Ch.App. 557 and *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1882) 9 Q.B.D. 648.]

The committee is greatly concerned by the prospect that at this very late stage in the liquidation it might be suggested that the European Court should decide an issue or issues. Such determination would inevitably cause considerable further delay. If the application of English insolvency set off rules might be contrary to European law [reference was made to *Fitzgerald v. Williams* [1996] Q.B. 657], that in itself militates against such application because of the delay that would be entailed in testing the matter. This is a legitimate consideration in circumstances where creditors have received no dividend at all after such a long time.

Cur. adv. vult.

6 August. SIR RICHARD SCOTT V.-C. handed down the following judgment. This hearing has been occasioned by an application made to the court by the English liquidators of Bank of Credit and Commerce International S.A. ("B.C.C.I.") for directions as to whether, before: (i) releasing funds already held in the central pool (which I will later explain) to the Luxembourg liquidators of B.C.C.I. for payment of dividends to creditors; and (ii) transmitting to the Luxembourg liquidators funds representing the proceeds of realisations made by the English liquidators, the English liquidators should make provision for various matters. The English liquidators also seek directions authorising them to pay out of the sums they retain certain limited dividends at the same time and at the same rate as dividends are paid by the Luxembourg liquidators. Although it is no more than an application for directions, the application has raised some important and very difficult issues of principle. It is, moreover, an application of very considerable practical importance to the many thousands of B.C.C.I. depositors who have been waiting for over five years for some dividend to be paid to them. The main issue for decision is whether or to what extent this court can disapply rule 4.90 of

the Insolvency Rules 1986 in order to allow the rules of Luxembourg insolvency regarding set-off to apply.

I do not think I can adequately describe the issues that I must deal with without first some rehearsal of the history of the B.C.C.I. liquidation. B.C.C.I. was incorporated in Luxembourg and formed part of a group that carried on a banking business on an international scale. B.C.C.I. was the wholly owned subsidiary of B.C.C.I. Holdings (Luxembourg) S.A. ("B.C.C.I. Holdings"). Some 77 per cent. of the shares in B.C.C.I. Holdings were owned by the ruler of the emirate of Abu Dhabi, the Crown Prince of the emirate and other Abu Dhabi government entities. Another wholly-owned subsidiary of B.C.C.I. Holdings was Bank of Credit and Commerce International (Overseas) Ltd. ("B.C.C.I. Overseas"). B.C.C.I. Overseas was incorporated in the Cayman Islands. B.C.C.I. and B.C.C.I. Overseas carried on the group's banking business in many parts of the world. In most countries the business was carried on through branches. In some countries, however, business was carried on through the medium of subsidiary companies. For example, B.C.C. Gibraltar Ltd. was incorporated in Gibraltar as a wholly owned subsidiary of B.C.C.I. for the purpose of carrying on the business in Gibraltar.

In 1972 the centre of operations of the B.C.C.I. group was based in Abu Dhabi. Shortly thereafter it was moved to London. But in 1987 the group's central treasury operations were moved from London back to Abu Dhabi and in the summer of 1990 the central management of the group was also moved from London to Abu Dhabi. By June 1991 the B.C.C.I. group operated in some 69 countries. B.C.C.I. had some 47 branches, including 24 in the United Kingdom, covering 13 countries. B.C.C.I. Overseas had 63 branches covering 28 countries. Other subsidiaries or affiliates of B.C.C.I. Holdings had some 260 branches covering 30 countries.

The group collapsed in the summer of 1991. Provisional liquidators of B.C.C.I. were appointed in England on 5 July 1991 on the application of the Bank of England. Similar action was taken by other regulators around the world with the intention and effect of closing down the operations of the B.C.C.I. group. In Luxembourg a commissaire de surveillance was appointed on 8 July 1991. In the Cayman Islands a receiver was appointed over B.C.C.I. Overseas and associated companies on 5 July 1991, and on 22 July 1991 the Grand Court of the Cayman Islands appointed provisional liquidators of B.C.C.I. Overseas and of International Credit and Investment Company (Overseas) Ltd. ("I.C.I.C. Overseas"). Both the Court of Session in Scotland and the High Court of the Isle of Man appointed provisional liquidators of B.C.C.I. in their respective jurisdictions.

A petition to wind up B.C.C.I. founded on allegations contained in a draft report that had been prepared by Price Waterhouse under section 41 of the Banking Act 1987 was presented by the Bank of England on 5 July 1991. When the petition came before the court on 30 July 1991 it was adjourned for four months to enable a possible restructuring support operation to be examined. In the course of his judgment Sir Nicolas Browne-Wilkinson V.-C. referred to the nature of the problems that would have to be faced if a winding up order were to be made. He said:

"This case raises, and will continue to raise, enormous problems. B.C.C.I. is a Luxembourg bank; it is not an English bank. As

A I understand it, if a winding up goes forward the assets of B.C.C.I. worldwide will be applicable for the creditors of B.C.C.I. worldwide. The attempt to put a ring fence around the assets of the creditors to be found in any one jurisdiction is, at least under English law as I understand it, not correct and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions."

B

In dealing with an application made on 27 August 1991 on behalf of a group of creditors, Sir Nicolas Browne-Wilkinson V.-C. said:

"The second delicate aspect is the relationship between this court and the court of Luxembourg. B.C.C.I. is incorporated in Luxembourg, which prima facie is the court where the prime winding up proceedings, if it ever gets that far, will have to be conducted as being the law of the country of incorporation. Some suggestions have been made that in some way it is inappropriate that that should be the primary administration were a winding up order to be made. That is not a view with which I can concur in any way. There is nothing to indicate that the court of Luxembourg would be in some way regarded as inappropriate, if otherwise under the general law that is the right court to administer the matter."

C

D

On 2 December 1991, when the adjourned petition came back before the court, Sir Donald Nicholls V.-C. (who had replaced Sir Nicolas Browne-Wilkinson V.-C. as Vice-Chancellor) referred to "the truly gargantuan task of preserving and realising assets of B.C.C.I. worldwide" and went on:

E

"One has only to read the provisional liquidators' report to the court dated 29 November to see what a mammoth and difficult task this is. The B.C.C.I. group operated through branches or representative offices in 75 countries, each has its own legal system and some have exchange control restrictions. Further, the affairs of B.C.C.I. and Overseas are inextricably intermingled. Plainly, worldwide co-operation is essential if the assets in the different jurisdictions are to be realised to the best advantage of the creditors. Otherwise and all too obviously there is likely to be long drawn out litigation in many jurisdictions between the different parts of the B.C.C.I. group."

F

G He adjourned the petition to 14 January 1992.

On 3 January 1992 B.C.C.I. went into liquidation in Luxembourg, the country of its incorporation. Three liquidators were appointed. The winding up order was made by Judge Welter. In a judgment submitted to the law courts in Luxembourg on 6 December 1991 and certified on 23 January 1992 she commented that "the company . . . transacted only some 10 per cent. of its worldwide business in Luxembourg, the preponderant volume being located in the United Kingdom," that "the method of winding up adopted by the court . . . should . . . take account of the non-conflicting provisions of English law" and that "the court's

H